



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
NATIONAL VEHICLE AND FUEL EMISSIONS LABORATORY
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OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Application of 40 CFR 93.104(e) to Houston Attainment SIP

FROM: Robert Larson *Robert Larson*
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Office of Transportation and Air Quality

TO: Rebecca Weber,
Associate Director, Multi-media, Planning, and Permitting Division
EPA Region VI

This memorandum responds to a request from EPA Region VI for clarification of section 93.104(e) of the Clean Air Act transportation conformity regulations (40 CFR parts 51 and 93). Region 6 has requested this clarification from the Office of Transportation and Air Quality (OTAQ) in the context of the 18-month conformity requirement that was triggered by the ozone attainment demonstration that was submitted for Houston. The conformity regulations establish triggers for demonstrating conformity following certain state and federal actions relating to State Implementation Plans (SIPs). We have coordinated this memorandum with the Office of General Counsel (OGC).

Section 93.104(e)(2) of the conformity rule requires a conformity determination using the motor vehicle emissions budgets ("budgets") in a submitted SIP within 18 months of a state's submission of an initial SIP to EPA. However, on March 2, 1999 the United States Court of Appeals overturned certain aspects of EPA's conformity rules, specifically as applicable here, the provision of 40 CFR 93.118(e)(1) that required the budgets in submitted SIPs to be used in conformity determinations 45 days after submission. See Environmental Defense Fund v. EPA, et al., 167 F.3d 641 (D.C. Cir. 1999). The court held that budgets could not be used in conformity determinations unless EPA affirmatively found them to be adequate.

Although the court did not directly address section 93.104(e), EPA has had to interpret this section of the conformity regulations in light of the fact that submitted SIP budgets can no longer be used in conformity determinations where EPA has found such budgets inadequate. OTAQ has advised various EPA regions of its interpretation that in light of the court's decision, where EPA has found the budget in an initial submission of an attainment SIP to be inadequate, the 18-month clock in 93.104(e)(2) is temporarily stopped. Thus, even if more than 18 months have elapsed since SIP submission, no conformity lapse will occur under section 93.104(e) if EPA has found the budgets in the submitted SIP inadequate prior to the expiration of the 18-month time period.

In the case of the Houston attainment demonstration SIP, EPA anticipates that it will not be making a subsequent adequacy determination prior to final approval of the SIP, which EPA anticipates will occur in October of this year pursuant to a consent decree in Natural Resources Defense Council, et al. v. Whitman, D.C. Cir. No. 99-2976. We understand that Texas is continuing to revise its attainment SIP and anticipates submitting an additional revision to the SIP this summer. Given the short time between submission of the final revisions to the SIP and the date EPA anticipates taking final action on the SIP, EPA is planning to address the adequacy of the attainment budgets in the final rulemaking action on the SIP, rather than acting in advance under EPA's web site adequacy process. See OTAQ's May 14, 1999, memorandum for more information regarding EPA's adequacy process for submitted SIPs with motor vehicle emissions budgets.

When EPA approves a SIP, section 93.104(e)(3) of the conformity rule establishes a separate requirement that conformity be established to the budgets in an approved SIP within 18 months of our SIP approval. OTAQ is now interpreting section 93.104(e) as a whole in the case of the Houston attainment SIP, where EPA will not find the budgets in a revised submission of that attainment SIP to be adequate as a separate action under our web notification adequacy process, but rather will find the budgets adequate only in the context of full approval of the attainment SIP because EPA will be taking final action on the SIP approval shortly. Under these circumstances, OTAQ concludes that the stopped conformity clock for an initial SIP submission previously established under 93.104(e)(2) will not start to run again because it has been superceded by the new SIP approval clock under 93.104(e)(3). Thus, there will only be one 18-month clock that has been triggered for conformity associated with the attainment SIP in Houston, running from the effective date of EPA's SIP approval. Under these circumstances the area will never be obligated to meet the conformity clock for an initial SIP submission under section 93.104(e)(2), since there will be no adequate attainment budgets available for conformity purposes prior to EPA's approval action.

It is important to note that until such time as EPA takes final action approving the Houston attainment SIP, any conformity determinations made in Houston would have to conform to the applicable budgets. The 9-percent rate-of-progress (ROP) SIP established budgets for 1999, which were found adequate on November 1, 1999, and will be approved shortly. In addition, ROP budgets for Houston were submitted for 2002 and 2005 in December of last year. Should EPA find these budgets adequate, they would become the applicable budgets for any future conformity determinations. Finally, we note that conformity in Houston must be demonstrated to the 2002 and 2005 ROP budgets if we find them adequate by June 2002 under 93.104(e)(2), since these budgets were contained in initial SIP submissions.

OTAQ currently anticipates that we will be amending the transportation conformity rule shortly to reconcile these timing issues resulting from the March 2, 1999 court decision. This amendment will codify the court's decision that budgets can only be used in conformity determinations once EPA has affirmatively found them adequate. EPA intends to also clarify in that rulemaking that in situations such as Houston areas will have a full 18 months to demonstrate conformity after budgets have been found adequate.

I trust that this memorandum clarifies our interpretation of 40 CFR 93.104(e) as applicable to the Houston ozone attainment SIP. Should you have any further questions on this matter, feel free to contact Meg Patulski of my staff ((734) 214-4842) or Sara Schneeberg of OGC ((202) 564-5592).